The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES E. McGOWAN, JR.

Appeal No. 2006-1610
Application No. 09/826,420

HEARD: June 6, 2006

Before KIMLIN, JEFFREY T. SMITH, and FRANKLIN, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-36.

Claim 1 is illustrative:

1. A medical article sterilization device comprising:

a pretreatment area for medical articles, the pretreatment area having a heat source to heat the medical articles;

a device to form a housing in a first web;

an article loading station where a medical article heated in the pretreatment area is loaded into the housing in the first web;

an alignment device to align a second web with the first web; and

a sterilization-sealing station where the first web and the second web, with the medical article loaded into the housing are sterilized and then the first and second webs are sealed together.

The examiner relies upon the following references as evidence of obviousness:

McGowan, Jr. (McGowan) 5,749,203 May 12, 1998

Multivac Packing Machines, "Pin Gas Flushing System for Uniform Gas Distribution" (1998)

Appellants' claimed invention is directed to a medical article sterilization device comprising a preheating area, an article loading station where the medical article is loaded into the housing of a first web, an alignment device for aligning a second web with the first web, and a sterilization-sealing station where the medical article is sterilized and the first and second webs are sealed together. Claim 2 on appeal further recites that the sterilization-sealing station also comprises gas injection pins for injecting gas between the first and second webs.

Appealed claims 1, 4-7, 15 and 18-21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over McGowan. Claims

2, 3, 8-14, 16, 17, and 22-36 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over McGowan in view of Multivac.

Although appellants submit at page 2 of the principal brief that claims 1-36 are each independently patentable and "do not stand or fall together," appellants have not presented substantive arguments with respect to any particular claim on appeal, with the exception of claim 2. Accordingly, the two groups of claims separately rejected by the examiner stand or fall together.

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for the reasons set forth in the Answer, which we incorporate herein, and we add the following primarily for emphasis.

We consider first the examiner's § 103 rejection of claims 1, 4-7, 15 and 18-21 over McGowan. There is no dispute that McGowan, like appellants, discloses a device for sterilizing a medical article comprising a housing in a first web, an article loading station, an alignment device, a sterilization-sealing

station for sterilizing a medical article inside the housing, and sealing the medical article within the housing. McGowan also teaches that it was known in the art to have a preheating area for increasing the activity of ethylene oxide, a sterilizing agent. Although McGowan teaches that the sterilizing devices of the prior art had the drawback of the length of time required for the process, we find no merit in appellants' argument that McGowan provides a teaching away from utilizing a preheating step to the extent that it would have been nonobvious to one of ordinary skill in the art. Rather, we fully concur with the examiner that one of ordinary skill in the art would have found it obvious to balance the tradeoff between a preheating step and the overall time of the process in determining the optimum operating parameters for the sterilization process. It is well settled that the optimization of result-effective variables is a matter of obviousness for one of ordinary skill in the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In referencing McGowan's teaching that length of time required for preheating is a drawback, appellants erroneously remark that "[t]he important thing is what did the author of the '203 [McGowan] patent think"

(page 11 of principal brief, fourth paragraph). The relevant issue is what one of ordinary skill in the art would have thought to be obvious at the time of filing the present application in light of the teachings of the prior art. In re Keller, 642 F.2d 413, 426, 208 USPQ 871, 882 (CCPA 1981).

Appellants also submit that the present inventor "realized that there may be some truth in the once-had belief that ethylene oxide gas is more active at elevated temperatures" (page 12 of principal brief, second paragraph). However, McGowan gives no indication whatsoever that such a belief is rejected by McGowan but, rather, that a preheating step requires more time. Manifestly, one of ordinary skill in the art would have to resort to only routine experimentation to determine the degree of sterilization required for any particular article.

As for the gas injection pins of claim 2 on appeal, we totally agree with the examiner that Multivac evidences the obviousness of substituting gas injection pins for the gas injection nozzle of McGowan. We agree with the examiner that it would have been prima facie obvious for one of ordinary skill in the art to substitute one functional equivalent for another. As stated by the examiner, one of ordinary skill in the art would

have been motivated to employ the gas injection pins of Multivac "in order to eliminate small cracks between webs of film where air can enter packages along with gas" (page 6 of Answer, first paragraph). Also, the examiner correctly finds that Multivac teaches that "any number of gas injection pins can be used" (page 11 of Answer, fourth paragraph). We are not persuaded by appellants' argument that Multivac is directed to packaging for red meats, sausage, etc. whereas McGowan is directed to the sterilization of medical articles. Regardless of the particular material enclosed or the specific gas to be injected, both McGowan and Multivac are directed to the same problem of injecting gas in a form-fill-and seal device.

As a final point, we note that appellants base no argument upon objective evidence of nonobviousness, such as unexpected results, which would serve to rebut the prima facie case of obviousness established by the examiner.

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED

EDWARD C. KIMLIN)
Administrative Patent Judge)
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JEFFREY T. SMITH) BOARD OF PATENT
Administrative Patent Judge) APPEALS AND
) INTERFERENCES
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